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In the Supreme Court of the United States

OCTOBER TERM, 1985

PETER DEFAZIO, ET AL., PETITIONERS

v.

CITY OF SPRINGFIELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred by denying petitioners' request for discovery.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 752 F.2d 1423. The opinions of the district court are reported at 564 F. Supp. 86 and 564 F. Supp. 90.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 1A-2A) was entered on February 4, 1985. A petition for rehearing was denied on May 16, 1985. The petition for a writ of certiorari was filed on August 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioners did not file an appendix to the petition for a writ of certiorari containing the opinions of the courts below. The petition accordingly does not comply with Rules 21.1(k)(i) and (ii) of the Rules of this Court. See also Rule 21.2 ("[t]he Clerk shall not accept any petition for writ of certiorari that does not comply with this Rule and with Rule 33").

STATEMENT

1. This action concerns the validity of contracts for the purchase and sale of electricity produced by three nuclear power plants in the Pacific Northwest. The power plants, which are being constructed by the Washington Public Power Supply System (WPPSS), are referred to as Projects 1, 2, and 3. The parties to the contracts are the WPPSS; the Bonneville Power Administration (BPA); and more than 100 local entities, including cities, public utility districts, and cooperatives. 752 F.2d 1425.[2]

Pursuant to these contracts, termed "net billing agreements," the Bonneville Power Administration purchased all of the electric power produced by Projects 1, 2, and 3, in order to secure a source of power to satisfy its customers' future energy needs.[3] Each local entity purchased from the WPPSS a share of the electricity to be generated by Projects 1, 2, and 3. In general terms, the agreements assign to the BPA the local entities' rights to the power produced by these projects. The BPA, in turn, guarantees the repayment of the cost of financing and constructing the projects. The BPA sells power to each local entity for which it bills the local entity on a monthly basis. The BPA credits the local entity's account in an amount equal to the monthly payment made by the local entity to the WPPSS for its share of the project. The credit arrangement is the "net billing" established by the agreements. 752 F.2d at 1425.

This litigation was precipitated by a controversy involving two other nuclear power plants sponsored by the WPPSS—Projects 4 and 5. The scheme governing the

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[2]A fourth agreement among these parties, relating to the Trojan Nuclear Project, is not in dispute here.

[3]The BPA is responsible for marketing both hydroelectric power produced by certain federal projects in the Pacific Northwest and power purchased by the BPA from other producers (752 F.2d at 1425).

disposition of power produced by those projects is completely different from the net billing arrangement at issue here. Moreover, the contracts relating to Projects 4 and 5 involve only the WPPSS and certain cities and local utilities; the BPA is not a party. Construction of Projects 4 and 5 was abandoned in 1982, and questions arose concerning the obligation of the cities and utilities to repay the cost of the projects' construction and financing. 752 F.2d at 1426, 1429. Several state courts reached different conclusions regarding the local entities' authority to enter into the relevant contracts. See *Chemical Bank* v. *WPPSS*, 102 Wash. 2d 874, 691 P.2d 524 (1984), cert. denied, No. 84-1258 (Apr. 29, 1985); *Asson* v. *City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, No. 83-1619 (Oct. 1, 1984); *DeFazio* v. *WPPSS*, 296 Or. 550, 679 P.2d 1316 (1984). The courts that held that the local entities lacked authority to enter into the contracts relied in part upon the fact that the local entities bear the "dry-hole risk" under these contracts, *i.e.*, the local entities would be required to repay the costs of the projects even if the projects were not built and no electricity was produced. See *Chemical Bank*, 102 Wash. 2d at 892, 691 P.2d at 535; *Asson*, 105 Idaho at 437, 440, 443, 670 P.2d at 844, 847, 850.

2. On November 15, 1982, the City of Springfield, Oregon—one of the local entities that is a party to net billing agreements relating to Projects 1, 2, and 3—brought an action in the United States District Court for the District of Oregon seeking a declaratory judgment that the net billing agreements are valid and enforceable. The City of Springfield alleged that uncertainty existed with respect to its authority to enter into the net billing agreement because an Oregon state trial court had held that the contracts relating to Projects 4 and 5 were unenforceable. The city joined as defendants all signatories to the net billing agreements. 752 F.2d at 1426. Petitioners, electric utility ratepayers in the City of Springfield, filed a motion to intervene,

and their motion was granted on March 29, 1983. They asserted that the agreements were invalid and unenforceable.

The district court granted summary judgment in favor of the City of Springfield, and issued an order declaring the net billing agreements to be valid. The court first stated that the agreements were governed by federal common law. Observing that the utilities "pay only for the power they use", and that "[t]he risk of a 'dry-hole' " lies with the BPA, the court found that "[t]he utilities entering into these agreements thus merely entered into authorized contracts for power" (564 F. Supp. at 95). It held that "all signatories to the net billing agreements had authority to enter into these federal contracts" (*ibid.*).

3. The court of appeals unanimously affirmed. The court specifically rejected petitioner DeFazio's claims that "the case was not properly decided because of the lack of a fully developed adversarial record" and that "the trial court erred by denying discovery" (752 F.2d at 1427). The court found that petitioner DeFazio "did not identify any questions of fact that would have prevented summary judgment. He questioned the participants' authority under state law. The district court correctly ruled that the dry-hole risk rested with the BPA. As a result, there are no factual issues which need to be resolved. A request for discovery may be denied when it is not relevant to the issues presented on a motion for summary judgment" (*ibid.*).

On the merits, the court concluded that "[a] review of the agreements without reference to either state or federal law confirms the reasonableness" of the district court's conclusion that the agreements "placed the dry-hole risk on the BPA" (752 F.2d at 1427). The court held that state law governs the authority of the public entities to enter into the agreements (*id.* at 1428). It found that the agreements constituted "contract[s] for the purchase of electricity" and that

state law authorized the public entities to enter into such contracts.[4] It concluded that the district court had properly declared the agreements to be enforceable. *Id.* at 1429.

ARGUMENT

The sole question presented in this case is whether the district court erred in denying petitioners' request to engage in discovery. The court of appeals correctly rejected this claim, and its determination does not conflict with any decision of this Court or another court of appeals. Review by this Court of petitioners' wholly fact-bound claim is not warranted.

1. Although petitioners present three questions in their petition, all three questions are grounded in a single claim: that the district court erred by denying petitioners' request for discovery.[5] Since that issue is inextricably tied to the specific facts of this particular case, the petition obviously presents no legal question of general significance warranting review by this Court.

2. Moreover, the court of appeals' decision is correct. In order to establish that the district court erred in denying their request for discovery, petitioners must show that the proposed discovery concerned a question of fact relevant to the issue presented by the motions for summary judgment granted by the district court. Cf. Fed. R. Civ. P. 56(c) (summary judgment appropriate if "there is no genuine

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[4]The court of appeals noted "several key differences" between the net billing agreements at issue here and the contracts relating to Projects 4 and 5 that were held unenforceable in state-court litigation, including the fact that the net billing agreements allocate the dry-hole risk to the BPA (752 F.2d at 1429).

[5]The first two questions presented in the petition concern the alleged inadequacy of the record before the district court; petitioners assert that the record was inadequate because the district court denied their request for discovery (see Pet. 11, 13).

issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law"). Since the summary judgment motion decided by the district court concerned only the legal issues of the proper interpretation of the net billing agreements and the parties' authority to enter into those agreements, petitioners obviously cannot make such a showing.

Petitioners argue that the district court should have granted discovery of the WPPSS bond resolutions relating to the construction of Projects 1, 2, and 3, asserting that these documents are "essential to the characterization of the net billing agreements because they provide the mechanism under which the Supply System was obligated to use its best efforts under the net billing agreements to finance nuclear plants 1, 2 and 3" (Pet. 11-12). Petitioners also state that "this financing aspect" was relied upon in the state court decisions finding the agreements regarding Projects 4 and 5 unenforceable (*id.* at 12). Petitioners' argument thus appears to be that the bond resolutions somehow might show that the net billing agreements suffered from the defect found by some state courts in the agreements relating to Projects 4 and 5—the allocation of the dry hole risk to the local entities (see *id.* at 8-9).

However, both courts below correctly concluded that the net billing agreements clearly "placed the dry-hole risk on the BPA." 752 F.2d at 1427; 564 F. Supp. at 95. Since the agreements are absolutely clear with respect to this issue, the bond resolutions could not have altered the interpretation of the net billing agreements adopted by the courts below. The court of appeals correctly concluded that "there are no factual issues which need to be resolved" through discovery (752 F.2d at 1427).[6]

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[6]Of course, petitioners have made no showing that the bond resolutions provide any support for a contrary interpretation of the net billing agreements. See Pet. 8-9 ("[t]he impact of the bond resolutions upon the

In addition, petitioners failed to preserve their discovery claim. Rules 56(e) and (f) of the Federal Rules of Civil Procedure require a party opposing a motion for summary judgment to submit affidavits that either "set forth specific facts showing that there is a genuine issue for trial" or demonstrate that the party "cannot for reasons stated present by affidavit facts essential to justify his opposition." The district court's trial management order in this case similarly required petitioners to "stat[e] with specificity the facts outstanding [that preclude summary judgment]" (Pet. App. 2D). Petitioners failed to comply with both of these requirements. Indeed, even now petitioners are unable to show how the bond resolutions could possibly create a dispute regarding a fact material to the legal issues decided by the court below. For this reason, too, petitioners' claim is completely without merit.[7]

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agreements *may* characterize the net billing agreements as a device for the security of bonds rather than a power sales agreement") (emphasis added). This vague statement plainly is insufficient to justify this Court's extraordinary intervention into what is a completely factual dispute.

Petitioners appear to argue (Pet. 16-17) that the court of appeals' determination that the agreements were governed by state law somehow revived their discovery claim. However, since the court of appeals noted that the meaning of the contracts was clear without reference to either state or federal law (752 F.2d at 1427-1428), the court of appeals' decision to apply state law could not have affected the interpretation of the contracts. Similarly, the application of a different legal standard in assessing the authority of the parties to enter into the agreements could not create a factual issue justifying petitioners' discovery request.

[7]Petitioners appear to argue (Pet. 14-15) that they were prejudiced by the schedule adopted by the district court. However, petitioners participated in the scheduling discussions held prior to the granting of their request to intervene. Moreover, the schedule established by the district court gave petitioners ample opportunity to present their views, permitting them to file both an opening brief and a reply brief (Pet. App. 1D-2D).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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